



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 723 of 2007

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW
IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE RESIDENT MAGISTRATE,

MILIMANI COMMERCIAL COURT..... 1ST RESPONDENT

THE CHIEF MAGISTRATE

MILIMANI COMMERCIAL COURT..... 2ND RESPONDENT

AND

RACHEL JANIRA ESAU..... 1ST INTERESTED PARTY

DAPHINE AFANDI MUTANGE..... 2ND INTERESTED PARTY

LAWRENCE ANGAYA SABWA..... 3RD INTERESTED PARTY

EX PARTE:- AIG INSURANCE COMPANY LIMITED

JUDGMENT

AIG Insurance Company Ltd, the ex parte Applicant herein, is challenging the decision of the RM's Court Milimani and Chief Magistrate's Court Milimani dated 21/5/07 in which the court ordered the Applicant to pay Racheal Janira Esou, Daphine Afandi Mutanga and Lawrence Angaya Sabwa the sums due to the beneficiaries of the estate of late Kennedy Kidambi Sabwa. The Notice of Motion was opposed by both the Respondents and Interested Parties.

The issues that seem to arise are whether:

- (1) Whether the Applicant has locus standi in this matter
- (2) Whether the Magistrate breached rules of national justice

- (3) Whether the Resident Magistrate acted in excess or without jurisdiction.
- (4) Whether the decision of the magistrate breached provisions of the law of Succession Act and the Civil Procedure
- (5) Whether the Applicant had alternative remedies
- (6) What is the effect of the defamation proceedings in CMCC 11248/06

The Notice of Motion is supported by a statement of facts and a verifying affidavit sworn by Charles Owinyo Adede, both dated 5/7/07, submissions dated 22/10/08 and 7/10/09 and list of Authorities.

The Respondent filed grounds of opposition dated 20/8/09 and Interested Parties filed submissions dated 2/11/07.

I think it is important to set out the brief facts of this case. The Applicant had insured the motor vehicle KAI 020 D against 3rd party Risks. The vehicle was involved in an accident on 22/7/04 as a result of which one Kidambi Sabwa died as per police abstract (EX A). A demand was made by Nelson Harun Advocates on behalf of the Interested Parties as representatives of the deceased's Estate (EX B). On 7/8/04 the counsel for the Applicant asked for evidence from Counsel (EX C) which the advocates did avail, (EX D) that included limited grant of letters of administration 'ad litem' issued under S 54 and 5th schedule of Law of Succession Act Cap.160 Laws of Kenya (EX E). Negotiations commenced and a settlement was arrived at of Kshs.1,201,000/= all inclusive and a discharge voucher was prepared and forwarded to the Interested Parties' advocate (EX F). That there has been no confirmation of the grant or discharge voucher. That at one time in August 2006, Daphene Afandi the 2nd Interested Party wrote to the Applicant Company that Nelson Harun had no authority to act on behalf of the deceased's estate (G) and on 22/8/06 the advocates wrote to the Applicant that the 2nd Interested Party had defamed them relating to the settlement (EX H). There were some correspondence between the parties and on 4/10/06, Nelson Harun sued the Applicant and the 2nd Interested Party in Chief Magistrate's Court 11248/06 alleging that both the 2nd Interested Party and Applicant had defamed the firm of Advocates (EX L).

The Applicant filed its defence (EX M) but during the pendency of the defamation case, the firm of advocates acting on behalf of the Interested Parties (Harun Nelson) applied to the Resident Magistrate's Court by way of an Originating summons seeking to have the payment of the Kshs.1,20,000/= made to the advocates and that the court do approve the apportionment. The order is EX N. It is the Applicant's contention that the firm of Harun Nelson having sued one of the Interested Parties together with the Applicant, could not purport to act for the same client in a different suit arising out of the same subject matter and that the limited grant of letters of administration did not give the firm of advocates the right to be paid the compensation due to the Estate; that the Applicant has been condemned unheard and the provisions under which the Originating Summons was brought do not exist. In addition to the above, Mr. Obura, counsel for the Applicant submitted that the Interested Parties had not obtained a confirmed grant in order to administer the Estate and that the Resident Magistrate's Court had no jurisdiction to deal with the matter rendering the decision of that court a nullity. That the proceedings were ex parte as the Interested Parties were never summoned before the Resident Magistrate's Court to confirm whether the firm of advocates was to receive the money or not. That though it was indicated that the compromise was based on the discharge voucher, that the discharge voucher could only have been effectual where confirmation of grant had been done. That since the 2nd Interested Party had complained about the firm of advocates who filed the compromise, the Resident Magistrate's Court should have taken that into account. The Applicant contends that they have been handling the money on behalf of the beneficiaries of the deceased's estate and being a trustee who suspects some fishy dealing with the

estate, it had to seek the court's intervention.

Mr. Meso is opposing the application submitted that the matter in Milimani was an originating summons brought pursuant to Order 36 Civil Procedure Rule which allows for filling of an Originating Summons by administrators of a deceased's estate and there the magistrate had jurisdiction to hear the application under those provisions of law.

As to breach of rules of natural justice, the Respondent contended that the Applicant was heard by the magistrate in the application for review (EX P) Mr. Meso urged that the magistrate's decision was subject of appeal as it touches on the merits of that decision.

In opposing the Notice of Motion, the Interested Parties relied on their application dated 29/5/08 in which the Interested Parties sought to have the order of leave and stay granted to the Applicant vacated, and submissions already referred to above. They agreed with the facts as set out by the Applicant. The Interested Parties agreed on the distribution of the estate since some were minors and there was need to invest their shares in the bank and the nature of the proceedings was ex parte because the Applicant has no say on how the beneficiaries of the estate would want the money distributed. That the order of the court discharged the Applicant from liability and the Applicant has no cause of action. Counsel urged that the court did not conduct any succession proceedings. That what was before the Resident Magistrate's court was a claim under the Fatal Accidents Act and that the Applicant has not shown any prejudice that it will suffer.

Locus Stadi:-

The question has arisen whether the applicant has any *locus standi* to bring this application. The Applicant is holding the funds due to the beneficiaries of the estate of Kidambi Sabwa. The Applicant has to be sure that the monies are released to the correct beneficiaries. If it releases the monies without authority to strangers, it would still have the responsibility of paying the rightful beneficiaries if they come up later. The applicant has a sufficient interest in the matter being a trustee of the monies due to the deceased estate. In **R V INLAND REVENUE COMMISSIONERS ex parte NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESSES LTD (1982) AC 617** Lord Diplock described what sufficient interest is. He said;

“the draftsmen ... avoided using the expression “a person aggrieved” although it lay ready to his hand. He choose instead ordinary English words which on the face of them leave the court an unfettered discretion to decide what in its good judgment it considers to be ‘a sufficient interest’ on the part of (a claimant) in the particular circumstances of the case before it. For my part, would not strain to give them any narrow meaning.”

The observation by Lord Diplock gives the definition of person with sufficient interest in the matter a very wide meaning and it all depends on the particular circumstances of the individual case. In the instant case, the Applicant had a right to withhold the money if it was not sure who the beneficiaries are or if there were unclear circumstances surrounding its release.

In his submissions, Mr. Obura relied on a new ground that the magistrate acted unreasonably. That is not one of the grounds pleaded in the statutory statement. Mr. Meso objected to its introduction. I also agree with Mr. Meso because Order 53 Rule 4 (1) Civil Procedure Rule requires that only those grounds pleaded in the statutory statement to be relied upon in the Notice of Motion. The Rule reads as follows,

“4 (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall be supplied on demand and no grounds shall, subject as hereinafter in the rule provided, be relied upon or any relief

sought at the hearing of the motion except the grounds and relief set out in the said statement.”

The above rule prohibits an Applicant from raising or relying on fresh grounds in the motion as it would be ambushing the other parties contrary to rules of natural justice, that the other side be given adequate notice of the case he is going to meet relied upon.

Alternative remedy:-

Both the Respondent and Interested Parties have urged that the Applicant should have pursued an appeal against the orders of the Resident Magistrate because what it seeks touches on the merits of the decision of the Resident Magistrate’s Court. Judicial Review deals not the merits of a decision but the decision making process itself. I have seen the Originating Summons filed before the Resident Magistrate dated 21/5/07. It was brought pursuant to Order 36 Rule 7 F; Order 31 Rule 6 Civil Procedure Rules and S 3A Civil Procedure Act. The Respondents were named as Mohan Chan and AIG Kenya Insurance Company. I have perused Order 36 and Rule 7 F does not exist. The Applicant also cited Order 36 Civil Procedure Rule 6. That rule reads as follows;

“6 (1) A next friend or guardian ad litem shall not, without the leave of the court, receive any money or other property on behalf of a minor, either

***(a) by way of compromise before decree or order or
(b) under a decree or order in favour of the minor,***

(2) where the next friend or guardian ad litem has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the court to receive the money or other movable property the court shall, if it grants him leave to receive the property, require such security.”

It was the Applicant’s submission that the Interested Parties are in breach of the above rule and the Resident Magistrate could not have granted any orders under it. I do agree with the Applicant that the Interested Parties were in breach of Order 31 Rule 1 Civil Procedure Rules which gives authority to the minor to sue through their next friend. The court had not granted leave to the Interested Parties to sue on behalf of the minors in accordance with Order 31 Rule 6 Civil Procedure Rules. It is apparent that the court had not been properly moved to grant the orders it purported to issue to the Interested Parties. The Interested parties also purported to invoke the inherent powers of the court under S 3A of Civil Procedure Act. The inherent powers of the court will only be invoked where there are no provisions of law available to cover a particular situation. In this instance, there was no vacuum in the law. If there was no provision of law under the Civil Procedure Act and Rules, the Succession Act does provide for distribution of a deceased’s persons estate and has substantive provisions that could have been invoked. I also agree with the Applicant’s submissions that, the Magistrate’s Court was not properly moved to grant the orders it purported to issue on 21/5 /07 and it acted outside or in excess of its jurisdiction.

Order 36 R 1 Civil Procedure Rules, does allow executors or administrators of a deceased person’s estate to take out an originating summons before a judge for relief on questions arising directly out of the administration of the estate or trust: Rule 12 requires the application to be brought by way of a chamber summons. The Resident Magistrate does not have jurisdiction to hear applications under Order 36 (1) Civil Procedure Rules as the same is bestowed only on the High Court. Besides Order 36 (1) requires that the persons moving the court be executors or administrators of a deceased person’s estate. Were the Interested Parties administrators of the deceased’s estate? It is not disputed that the Interested Parties had been issued with Limited grant of letters of administration (Ex E) dated 10/12/04. As correctly held in ***RE SUCCESSION (2000) 2 EA LIMITED*** grant is obtained for the sole purpose of filing a suit. It does not confer powers for distribution of the estate. In this case, the limited grant was obtained for purposes of filing suit against the owners of the vehicle that caused

the accident but the parties negotiated and reached a compromise. It was upto the Interested Parties to move the court for confirmation of grant in order to be able to distribute the estate of the deceased. S 47 of Succession Act bestows the jurisdiction on the High Court but to conform grants under S 48 a Resident Magistrate may entertain a succession matter in a court and the Magistrate must be gazetted by the Hon. The Chief Justice to deal with these matters. Where there is no High court and where the estate does not exceed Kshs.100,000/=. In this case, there is a High Court in Nairobi where the Resident Magistrate heard the case. There is a Family Division in Nairobi High Court that specifically deals with succession matters. But even if this matter were outside Nairobi, that court would not have jurisdiction as the estate was worth Kshs.1,201,000/= Out rightly, the Resident Magistrate's Court could not have jurisdiction to deal. The magistrate's court had no jurisdiction to entertain the matter. From whatever angle the matter is looked at, the Resident Magistrate's Court had no jurisdiction to handle. It is true that the Applicant could have appealed that the decision, but the decision is a nullity *ab initio* and the best mode of redress is by way of Judicial Review and the matter is properly before this court.

It is trite law that availability of an alternative remedy is not a bar to Judicial Review. This is because of the nature of Judicial Review remedies which deal with, not the merits of the case but the fairness of the process by which a decision was arrived at. But, the Applicant at leave stage, should disclose the other available remedies and why they are not effectual. Sometimes in certain cases, one can go either way. This is one such case. Judicial Review is supposed to be a speedy mode of resolving disputes and the whole proceeding being a nullity, the best mode to come to court was by way of Judicial Review.

Alleged breach of Rules of natural justice:-

The Applicant also alleges that the lower court did not observe rules of natural justice because they were not heard in the originating summons. Order 36 Rule 12 provides that such application will be by way of chamber summons. It does not state that it has to be made *ex parte*, The originating summons clearly shows the Applicant herein as the 2nd Respondent but the Interested Parties did not bother to serve it.

The Applicant was still holding the money due to the estate yet it was not being served with the Originating Summons application. It was improper to leave out the 2nd Interested Party. May be at that stage, the issue of jurisdiction of that court and the outstanding issues between the 2nd Interested Party and her advocate could have been resolved.

Effect of Defamation Proceedings:-

Should the court have ignored this pending suit between Harun Nelson & Co. Advocates on one hand and the 2nd Interested Party and the Applicant on the other? (CMCC 11248/06). The existence of the defamation suit filed by Nelson M.D. Harun against the 2nd Interested Party and the Applicant is not denied. At the time Harun's advocates filed the originating summons on behalf of the Interested Parties seeking to distribute the deceased's estate, the said suit was alive and pending before the court. There is an obvious conflict of interest for the same firm of advocates which has sued of the Interested Parties to purport to act for all the Interested Parties in another suit in a matter arising from the same subject matter. The Resident Magistrate's Court should not have ignored that fact. Either the firm of advocates should have withdrawn the Defamation Case 11248/06 against all the parties, 2nd Interested Party and Applicant and the parties agree that the matter is settled instead of the Counsel going behind the Applicant and filing an originating summons to distribute the same money arising from the case in which the 2nd Interested Party had alleged that the advocate had acted without authority and failed to disclose

facts. The conduct of the firm of Harun Nelson advocates and 2nd Interested Party could not be ignored and there would be a question of whether they were acting in the best interests of all the beneficiaries in purporting to distribute the estate during the pendency of a suit between them.

ILLEGALITY

In *COUNCIL OF CIVIL SERVICE UNION V MINISTER FOR CIVIL SERVICE (1985) AC 374*, Lord Diplock considered the ground of illegality and had this to say at pg. 410

“By ‘illegality’ as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.”

In the instant case, the lower court did not understand correctly the law that regulated the matter that was before it as a consequence of which the court fell into error. I find that the decision of 21/5/07 is an illegality. Certiorari lies to quash decisions made without or in excess of jurisdiction or where there has been breach of rules of natural justice. The Applicant is deserving of an order of certiorari to quash the Respondent’s decision dated 21/5/09 and the consequent decision of 18/6/07 by the same court in terms of prayers 1 and 2 of the notice of motion dated 11/7/09. Prohibition lies to prohibit the continuation of proceedings in breach of rules of natural justice or in excess or without jurisdiction. I will grant prayer 3 to prohibit the Respondent from conducting any further succession proceedings touching on the estate of the late Kennedy Kidambi Sabwa. The Interested Parties should comply with the provisions of the Succession Act in respect of a administration of the deceased’s estate. Each party to bear their own costs.

Dated and delivered at Nairobi this 19th day of February 2010.

R.P.V. WENDOH

JUDGE

In the Presence of: -

Mr. Gacheru Holding brief for Muturi for 1st, 2nd, 3rd Interested Parties

Ms Mburu Holding brief for Mr. Obura for Applicant

Muturi - court clerk